Supreme Court of the United States

OCTOBER TERM, 1940

No. 348

THE OREGON SHORT LINE RAILROAD COMPANY, a corporation, and SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

GEORGE H. SMITH
Salt Lake City, Utah

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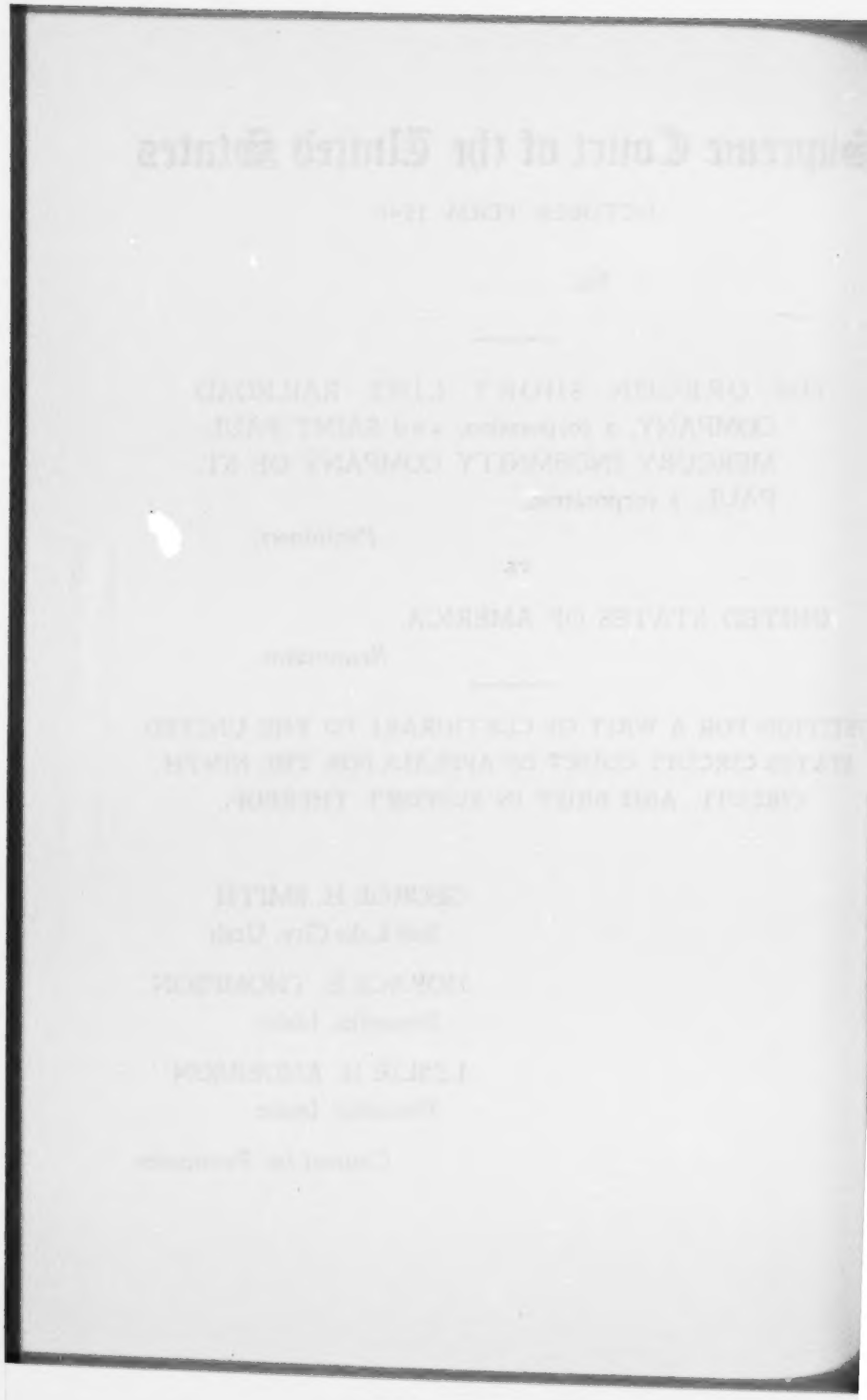

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In the Supreme Court of the United States

October Term, 1940

No._____

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show to this Honorable Court that this is a petition for a writ of certiorari to the United States Circuit Court of Appeals, Ninth Circuit, to review a decision made and entered by that Court on June 27, 1940, reversing a judgement of the United States District Court for the District of Idaho, dismissing a complaint by the United States to recover judgement in the sum of ten thousand dollars for the killing of four Indians, without

negligence, on a public highway crossing within the limits of an Indian reservation in the State of Idaho.

I.
SUMMARY STATEMENT OF THE MATTER INVOLVED

The issue in this case involves a determination of whether or not an Act of Congress (25 Stat. L. 452) accepting and ratifying an agreement made with the Shoshone and Bannock Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation in the Territory of Idaho, for the grant of a right-of-way through said reservation to the Utah and Northern Railway Company, created, in and of itself, an absolute and unconditional liability on the part of the railroad company for the killing or maiming of an Indian, regardless of fault or negligence on the part of the railroad company, or of proximate cause, or contributory negligence of such Indian, or unavoidable accident. The action is based on the statute and a bond given thereunder, but the bond is no broader than the statute and creates no liability if the statute does not.

The facts of the case are that on March 3rd, 1873, Congress passed an act, 17 Stat. L. 612, granting to the Utah and Northern Railway Company a right of way over the public lands for the construction of a railroad from Utah northerly through the state of Idaho and into Montana to connect with the Northern Pacific Railroad. A railroad was constructed by the Utah and Northern Railway Company which filed in the Department of Interior a series of fifteen maps of location, eleven of which were approved March 6th, 1882, and the other four show-

ing the line of road through the Fort Hall Reservation were disapproved March 27th, 1882, for the reason that the law granting the right of way through the public domain did not entitle the railroad company to construct its line across the Indian reservation, which was not public land within the meaning of the act. The situation was presented to Congress in a report submitted December 21st, 1885, whereupon a United States Indian Inspector and United States Indian Agent were detailed by the Secretary of the Interior to negotiate with the Indians for the relinquishment of a right of way for the railroad company across the reservation and for the relinquishment of other lands for the creation of Pocatello Townsite, and on May 27th, 1887, an agreement was signed between the above representatives of the Government and the Indians, which is recited in 25 Stat L. 452. This agreement so far as the railroad company was concerned merely consented and agreed to the relinquishment of a right of way two hundred feet wide with additional lands for station grounds in consideration of the payment to the Secretary of the Interior for the use and benefit of the Indians of the sum of $8.00 per acre. No reference to a bond of any kind, nor of liability for damages, appeared in the agreement. Appendix pp. 24-26.

By Section 14 of the act ratifying the agreement it was provided, but not because of any agreement with the Indians, that the railroad company should execute a bond to the United States conditioned for the

> "due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or

> their livestock, in the construction or operation of said railway, or by reason of fires originating thereby; the *damages* in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho," etc. Appendix p. 34.

The Oregon Short Line Railroad Company, one of the petitioners herein, succeeded to the rights of the Utah and Northern Railway Company, and on July 30th, 1935, that company, as principal, and the Saint Paul Mercury Indemnity Company, co-petitioner herein, as surety, executed a bond in the sum of ten thousand dollars in the language of the statute for the

> "due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, * * *." (R. 9)

Thereafter, on January 19, 1938, a collision occured within the limits of the Reservation between a railroad train of the Oregon Short Line Railroad Company and an automobile occupied by four Indians and an unborn infant (R. 11), and on December 13th, 1938, the United States, respondent herein, as plaintiff, instituted a suit against your petitioners alleging in substance the foregoing facts, to which may be added that it was alleged in ParagraphVI of the complaint (R.4) that the Indian Reservation had been created on the 3rd day of July, 1868; that the funeral expenses incurred in the burial of the Indians amounted to approximately $2,500.00, and concluding with an aver-

ment that by reason of the matters and things theretofore alleged in the complaint there was due, owing and unpaid from the defendents to the plaintiffs, for the use and benefit of the Shoshone and Bannock Indians, the sum of $10,000.00. A copy of the act of Congress, 25 Stat L. 452, is embraced in the appendix hereto and a copy of the bond appears at R. 8. It was nowhere charged in the complaint that the railroad company or any of its agents or servants were guilty of any negligence or breach of duty toward the Indians, nor was any statute of the state of Idaho creating a right of action for death pleaded or counted upon.

The defendants filed their answer in which they set forth as a first defense that the complaint failed to state a claim against the defendants or either of them on which relief could be granted (R. 28). They admitted the building of the road, the passage of the act by Congress, and the occurance of the collision in which the Indians were killed, and for a third defense alleged that the plaintiff was seeking recovery solely upon the statute and the bond; that the statute did not create a right of action for death of a human being or provide a measure of damages therefor; that the statute was merely one providing for the giving of a bond to secure the payment to the United States, for the use and benefit of the Indians, of damages which might lawfully accrue to them in consequence of the violation of their legal rights, and that to render judgement in favor of the plaintiff and against the defendants, or either of them, would deprive them of property without due process of law contrary to and in violation of the provisions of the Fifth Amendment to the Constitution of the United

States. The plaintiff therupon moved to strike the third defense and moved for judgement on the pleadings (R. 34). Said motions came regularly on for hearing and the court rendered its opinion in which it held that the complaint did not state a claim against the defendants upon which relief could be granted, and sustained the first ground of defense appearing in the answer (R.36,43), and on September 19, 1939 rendered judgement in favor of the defendants. The opinion (R. 36) is not officially reported. This judgement was reversed by the Ninth Circuit Court of Appeals June 27, 1940 (R. 70).

II

BASIS OF JURISDICTION

The jurisdiction of this court is based upon the following grounds: the right of review is provided by section 240 Judicial Code, 28 U. S. C. A. Sec. 347, 36 Stat. 1157, Sec. 1, 43 Stat. 938. The judgment to be reviewed was entered June 27, 1940; the time to apply for writ of certiorari, three months from date of judgement, is provided by Section 6, 26 Stat. 828, Section 6, 39 Stat. 727, Section 8 (a, b, d.) 43 Stat. 940, 28 U. S. C. A. Sec. 350, and will expire September 27, 1940.

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court; said question has been decided probably in a way in conflict with the applicable decisions of this court. The question of law to be decided is an interpretation of an Indian treaty and an Act of Congress of the United States to accept and ratify an agreement made with the Shoshone and Bannock Indians for the surrender and relinquishment to the United States a portion of the

Fort Hall Reservation in the Territory of Idaho, for the grant of a right of way through said reservation to the Utah and Northern Railway Company, c.936, 25 Stat.452, which is in the appendix hereto. The particular portion of said statute herein involved is Section 14 thereof (R. 34).

III
THE QUESTION PRESENTED

The question to be decided is whether Section 14 of the Act requiring the railroad company to execute a bond for the "due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian * * * in the construction or operation of said railway" created a liability for injury (a) without fault or negligence, and (b) not proximately resulting from the operation of said railway, or provided security for the payment of damages which might accrue in consequence of the violation of a legal right.

IV
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Oregon Short Line Railroad Company was required to, and did, file a bond to insure the due payment of any and all damages which might accrue on account of the killing or maiming of an Indian; four Indians were killed in a railroad crossing collision; the Circuit Court of Appeals held that damages accrued from the mere killing of the Indians, without regard to fault or negligence of the Railroad Company, and that the Railroad Company was not entitled to a hearing on that point. In so holding the

court rejected all general rules of statutory interpretation and erroneously construed a federal statute which had not previously been construed, and decided a federal question in conflict with the applicable decisions of this Court, all of which is more fully discussed in the brief submitted herewith.

Congress must be presumed to use words in their known and ordinary signification.

> Old Colony R. Co., vs. Comr's., 284 U.S. 552, 560.

No Statute is to be construed as altering the common law further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.

> Shaw vs. Merchants National Bank, 101, U. S. 557;
>
> T. & P. R. Co., vs. Abilene Cotton Oil Co., 204 U. S. 426, 436-437.

Where the language used expresses the intention reasonably intelligibly and plain it must be accepted without modification by resort to construction or conjecture.

> Thompson vs. United States, 246 U. S. 547.

When a word which has a known legal meaning is used in a statute it must be assumed that the term is used in its legal sense in the absence of a clear indication to the contrary.

Westerlund vs. Black Bear Min. Co., 121 C.C.A. 627, 203 Fed. 599, 605;

Kepner vs. U. S., 195 U. S. 100;

Shugart vs. Egan, 83 Ill. 56;

Tetzner vs. Naughton, 12 Ill. Ap. 148, *152*.

"'Damages' is the sum of money which the law awards or imposes as pecuniary compensation, recompense or satisfaction for an injury done or a wrong sustained as a consequence either of a breach of a contractual obligation or tortious act."

15 Am. Juris. 387, Sec. 2, "Damages" citing U. S. Steel Prod. Co., vs. Adams, 275 U. S. 388.

It is respectfully submitted that this case presents an important problem squarely within the jurisdiction of this court. It involves the original interpretation of a federal statute, the words of which have been construed out of their normal legal sense and in an intolerably oppressive manner at variance with principles of natural justice. It presents a question which, unless settled by this tribunal, will inevitably be frequently recurring, and upon which the District Judge, who reached a decision at variance with that of the Circuit Court of Appeals, should have a final interpretation and decision by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals, Ninth Circuit, commanding said Court to certify and send to this

Court a full and complete transcript of the record herein, to the end that the case may be reviewed and determined by this Court, as provided by the Statutes of the United States, and that the judgment herein of said Circuit Court of Appeals, Ninth Circuit, be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated, August 19, 1940.

OREGON SHORT LINE RAILROAD COMPANY, SAINT PAUL MERCURY INDEMNITY COMPANY OF ST. PAUL

By GEORGE H. SMITH
HORACE B. THOMPSON
LESLIE H. ANDERSON

Counsel for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1940

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OREGON SHORT LINE RAILROAD COMPANY, a corporation, and SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation.

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.
OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals, Ninth Circuit, in this case (R. 56) was entered on June 27, 1940,_____Fed. (2d)_____. That decision reversed the judgment of the District Court dismissing the complaint (R. 44). The District Court decision (R. 36) is not officially reported.

II.
BASIS OF JURISDICTION

The basis of jurisdiction is set forth in the petition

for writ of certiorari, page 6 supra, in support of which this brief is submitted.

III.

STATEMENT OF THE CASE

This has already been stated in the preceding petition, pp. 2-6, supra, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred

1. In holding that by the provision of Section 14 of the Act of September 1, 1888, 25 Stat. 452, an absolute and unconditional liability was imposed upon the railroad company and its surety to respond in damages for the killing or maiming of an Indian, without regard to whether the company was guilty of any fault or negligence, and in holding, in effect, that the statute created a right of action for death.

2. In holding that decisions dealing with general statutes had no application in the interpretation or construction of the statute under consideration.

3. In holding that the complaint, which did not charge fault or negligence, stated a claim against the defendant upon which relief could be granted.

4. In reversing the judgment of the District Court in favor of the appellee, petitioner herein.

V.
ARGUMENT

The statute did not purport to create any new right; it simply provided for a bond to secure the payment of damages which might accrue in consequence of the violation of a legal right.

The provision in question is contained in Section 14 of the Act appearing at page 34 of the appendix hereto. The language is

> "that said railway company shall execute a bond to the United States to be filed with and approved by the Secretary of the Interior in the penal sum of ten thousand dollars for the use and benefit of the Shoshone and Bannack Tribes of Indians conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the construction or operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure of the railway company to affect an amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho * * *".

The document to be considered is not a layman's agreement but a piece of legal draftsmanship drawn in the Interior Department (R. 14). The language therefore should be given its usual legal significance.

> Old Colony R. Co. vs. Comr's., 284 U. S. 552, 560;

Kepner vs. United States, 195 U. S. 100, 124;

United States vs. Merriam, 263 U. S. 179, 187;

Westerlund vs. Black Bear Min. Co., 121 C.C.A. 627, 203 Fed. 599, 605;

McCool vs. Smith, 1 Black 459.

A statute is not to be construed as making any innovation upon the common law which it does not fairly express.

Shaw vs. Merchants Nat'l. Bank, 101 U. S. 557;

T. & P. R. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, 436-437.

U. S. vs. Oregon Short Line Railroad Co. R. 41.

A statute will be construed in such a way as to avoid unnecessary hardship when its meaning is uncertain.

Burnet vs. Guggenheim, 288 U. S. 280.

Where there is no ambiguity in the words of a statute there is no room for construction.

Helvering vs. City Bank Farmers Trust Co., 296 U. S. 85;

United States vs. Missouri Pac. R. Co., 278 U. S. 269.

"'Damages' is the sum of money which the law awards or imposes as pecuniary compensation, recompense or satisfaction for an injury done or a *wrong*

sustained as a consequence either of a breach of a contractual obligation or tortious act."

> 15 Am. Juris. 387, Sec. 2, "Damages," citing U. S. Steel Prod. Co. vs. Adams, 275 U. S. 388.

An examination of Section 14 of the Act at once discloses that the case falls within the rule of law last above cited. The first sentence of the section is

> "that said railway company shall execute a bond,"

the purpose of the bond being

> "for the due payment of any and all damages which may accrue."

Damages do not accrue without the violation of a legal right. Here the word is used as a noun. The District Court so recognized it and the appellate court reversed this ruling. That the word was intended to be used as a noun to signify the pecuniary compensation accruing in consequence of a wrongful act follows from the use of the word "accrue" and from the further fact that a bond is given to secure their payment. If it had been intended to use the word in the sense of injury, as distinguished from damages, the word "accrue" would not have been used in association therewith, nor would it have been provided later in the same section

> "the *damages* in all cases in the event of failure of the railway company to affect an amicable settlement with the parties in interest to be recovered in any court of

the Territory of Idaho having jurisdiction * *".

"In the absence of express restriction it may be assumed that a term is used throughout a statute in the same sense in which it is first defined."

Pampanga Sugar Mills vs. Trinidad, 279 U. S. 211, *218*.

The word "damages" as used in both instances, both according to ordinary rules of grammar and legal significance, means the compensation to be recovered for a wrongful act. A frequent situation of one suffering an injury or being damaged without the right to recover damages is that of damnum absque injuria, of which Taylor et ux vs. C. M. & St. P. R. Co., 85 Wash. 592, serves as an illustration. There the court held:

"The constitutional provision that no private property shall be taken or damaged without just compensation does not change or lessen the force of damnum absque injuria, and property is not 'damaged' within such provision except by some unlawful act, omission, or negligence amounting to an actionable wrong."

See also:

City of North Vernon vs. Voegler, 103 Indiana 314;

Carroll vs. Rye Twp., 13 No. Dak. 458;

West Virginia Trans. Co., vs. Standard Oil Co., 50 West Va., 311.

An injury does not "accrue"; it is an event from which damages accrue when a legal right has been violated.

Bennett vs. Thorne, 36 Wash. 253.

At common law no damages were collectible for death, even by wrongful act.

Mobile Life Insurance Co., vs. Brame, 95 U. S. 754;

The Harrisburg, 119 U. S. 199.

The violation of a statutory, or other, obligation, does not create liability unless such violation is a proximate cause of the injury.

Wheeler vs. O. R. & N. Co., 16 Idaho 375;

Southern R. Co., vs. Walters, 284 U. S. 190, 194;

U. S. vs. Oregon Short Line RR Co., (R. 40);

Jennings, et al., vs. Davis, 109 C.C.A. 451, 187 Fed. 703.

The fact alone that an act of defendant was in violation of a penal statute does not afford ground for the recovery of damages by a third person, unless such act was also the proximate cause of the injury complained of.

Jennings vs. Davis, 109 C.C.A. 451.

This is true with respect to violation of the Dram Shop Act.

Shugart vs. Eagan, 83 Ill. 56;

Tetzner vs. Naughton, 12 Ill. Ap. 148;

Dudley et al., vs. State, 40 Ind. App. 74.

Brief comment may be made concerning the opinion of the Circuit Court of Appeals. The principal opinion did not discuss and does not appear to have considered any of the propositions of law above presented. It expressly rejected them, stating at the end of the opinion, "Cases dealing with general statutes have no application." (R. 67). It first discussed the question of the power which Congress *possessed*, omitting discussion of the power that Congress *exercised*, as disclosed by the language employed, and expressed the opinion that Congress possessed the power to provide that the railroad company should be liable in damages for injuries to Indians regardless of fault. That, however, does not answer the question as to whether Congress, by the language used, exercised such power.

In place of considering or applying any of the rules of statutory construction which were cited by your petitioners either to that court or to this court upon the presentation of our petition, the court applied the rule announced in Alaska Pacific Fisheries vs. Unied States, 248 U. S. 78, to the effect that

> "statutes passed for the benefit of dependent Indian tribes or communities are liberally construed, doubtful expressions ordinarily being resolved in favor of the Indians." (R. 60-61)

Thereupon the court proceded upon that basis to resolve

all doubts in favor of the respondent herein. That constituted a misapplication of the rule announced in the Alaska Pacific Fisheries case, which involved a controversy merely between the United States and the Indians. In disposing of the question of the fishing rights of the Indians in question, the court, at the end of its opinion in favor of the Indians, said:

> "This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. Choate vs. Trapp, 224 U. S. 665, 675, 56 L. Ed. 941, 32 Sup. Ct. Rep. 565, and cases cited."

This requires an analysis of Choate vs. Trapp. That suit involved a contention by 8,000 Choctaw and Chickasaw Indians who held land in Oklahoma under grants which contained provisions that the lands should be nontaxable for a limited time. After the issuance of the patents to the Indians Congress passed a general act removing restrictions against sale of the land by the Indians and providing that in such event the tax exemption should cease to exist, whereupon the state of Oklahoma undertook to tax the lands, and, based upon the statutes of the United States and treaties which expressly provided that each member of the tribe should have allotted to him a share of the land, all of which "shall be nontaxable while the title remains in the original allottee," and that the patents issued to such allottees "should be framed in conformity with the provisions of the agreement," the court held on the plain language of the patents and the statutes that the land was

not subject to taxation by the State of Oklahoma. There the court, contrasting tax exemption granted by states where the state received nothing and the beneficiaries of the exemption gave nothing for the provision of the law allowing such exemptions, said:

> "There was no consideration moving from one to the other. Such exemption was a mere bounty, valuable as long as the state chose to concede it, but as tax exemptions are strictly construed, it could be withdrawn at any time the state saw fit.
>
> "But in the *government's* dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the *United States*, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. * * *" (emphasis supplied)

The language as applied to the facts of the case was appropriate, and upon the facts of the case there could be no question but what the court was fully warranted in arriving at the conclusion that under the language employed the tax exemption should be sustained.

Neither of the foregoing decisions, however, are authity for applying to a third party the rule which the government there applied in its dealings with its wards, and such a rule has never been applied by this court in controversies between Indians and persons not standing in the special

relationship which the United States bears to its Indian wards.

The principal opinion also resorts to the doubtful expedient of citing another act of Congress granting a different right of way to the Utah and Northern Railroad Company, which provides that the railroad company shall pay all damages which the Indians may sustain on account of fires originating by or in the construction or operation of such road (R.61). The difficulty with that argument is that that act has never been judicially interpreted, but if it should be, it might well be held that in that case, because of the language employed, an unconditional liability was imposed by Congress, but because of the difference of the language employed it would still be no guide as to what Congress intended and what liability it in fact imposed by the enactment of the statute upon which the present suit is based.

A specially concurring opinion was written by one of the circuit judges, in which opinion it was sought to support the respondent's contention by quoting the popular definition of the word "damage" appearing in Webster's New International Dictionary, Second Edition, in contrast to the legal meaning appearing in Bouvier's Law Dictionary (Rawls 3rd Rev.). Upon investigation it appears that Webster's Dictionary gives the definition of damages as employed in law as follows:

> "4. *Pl.* Law. The estimated reparation in money for detriment or injury sustained; compensation or satisfaction imposed by law for a wrong or injury

caused by a violation of a legal right. Damages are either *substantial* or *nominal,* according to whether there has been actual or merely nominal loss. (Cf. Damnum Absque Injuria.) Legal damages are limited to those which are the natural and proximate result of the wrong done. Some do not include under the term *damages* the amount sued for upon a liquidated claim, as in an action for recovery for a sum of money due upon a bond, contract or quasi contract.

"'Direct' or 'general' *damages* are those which are the necessary and immediate consequence of the wrong, while 'indirect' or 'special' *damages* are sometimes granted in respect of its remoter consequences."

This definition and the rules of statutory construction announced by this Court were wholly disregarded and set aside in the opinion of the Circuit Court of Appeals. Given their proper interpretation and application, it is respectfully submitted that by the plain language of the statute it is clear that Congress did not intend or undertake to impose absolute and unconditional liability upon the railroad company for the death of an Indian resulting from collision occurring without fault or negligence on the part of the railroad company, the sole proximate cause of which may have been the act of the Indian in driving upon a railroad track in the daytime in front of an approaching train in plain view and in disregard of its signals and other warnings received by him. It is therefore respectfully submitted

that this Court should grant a writ of certiorari to review such decision, and finally reverse it.

OREGON SHORT LINE RAILROAD COMPANY, SAINT PAUL MERCURY INDEMNITY COMPANL OF ST. PAUL

By GEORGE H. SMITH
HORACE B. THOMPSON
LESLIE H. ANDERSON
Counsel for Petitioners.

APPENDIX

25 STAT., 452

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That a certain agreement made and entered into by the United States of America represented as therein mentioned, with the Shoshone and Bannack Indians resident in the Fort Hall Reservation in the Territory of Idaho, and now on file in the office of Indian Affairs, be, and the same is hereby, accepted, ratified, and confirmed. Said agreement is executed by a duly certified majority of all the adult male Indians of the Shoshone and Bannack tribes occupying or interested in the lands therein more particularly described, in conformity with the provisions of article eleven of the treaty concluded with said Indians July third, eighteen hundred and sixty-eight (Statutes at Large, volume fifteen, page six hundred and seventy-three), and is in the words and figures following, namely:

"Memorandum of an agreement made and entered into by the United States of America, represented by Robert S. Gardner, U. S. Indian Inspector, and Peter Gallagher, U. S. Indian Agent, specially detailed by the Secretary of the Interior for this purpose, and the Shoshone and Bannack tribes of Indians, occupying the Fort Hall Reservation in the Territory of Idaho, as follows:

ART. I. The said Indians agree to surrender and relinquish to the United States all their estate, right, title, and interest in and to so much of the Fort Hall Reservation as is comprised within the following boundaries, that is to

say: and comprising the following lands, all in town six (6) south of range thirty-four (34) east of Boise Meridian.

West one-half section twenty-five (25); all of section twenty-six (26); east one-half section twenty-seven (27); northwest quarter section thirty-six (36); north one-half section thirty-five (35); northeast quarter of southwest quarter section thirty-five (35); northeast quarter of the northeast quarter of section thirty-four (34); comprising an area of eighteen hundred and forty (1840) acres, more or less, saving and excepting so much of the above-mentioned tracts as has been heretofore and is hereby relinquished to the United States for the use of the Utah and Northern and Oregon Short Line Railways.

The land so relinquished to be suveyed (if it shall be found necessary) by the United States and laid off into lots and blocks as a town-site, and after due appraisement thereof, to be sold at public auction to the highest bidder, at such time, in such manner and upon such terms and conditions as Congress may direct.

The funds arising from the sale of said lands, after deducting the expenses of survey, appraisement, and sale, to be deposited in the Treasury of the United States to the credit of the said Indians, and to bear interest at the rate of five per centum per annum; with power in the Secretary of the Interior to expend all or any part of the principal and accrued interest thereof, for the benefit and support of said Indians in such manner and at such times as he shall see fit.

Or said lands so relinquished to be disposed of for the benefit of said Indians in such other manner as Congress may direct; and

Whereas in or about the year 1878 the Utah and Northern Railroad Company constructed a line of railroad running north and south through the Fort Hall Reservation, and has since operated the same, without payment of any compensation whatever to the said Indians, for or in respect of the lands taken for right of way and station purposes; and

Whereas the treaty between the United States and the Shoshone and Bannack Indians, concluded July 3, 1868, (15 Stat. at Large, page 673) under which the Fort Hall Reservation was established, contains no provisions for the building of railroads through said reservation: Now, therefore,

ART. II. The Shoshone and Bannack Indians, parties hereto, do hereby consent and agree that upon payment to the Secretary of the Interior for their use and benefit of the sum of ($8.00) eight dollars for or in respect of each and every acre of land of the said reservation, taken and used for the purpose of its said railroad, the said Utah and Northern Railroad Company shall have and be entitled to a right of way not exceeding two hundred (200) feet in width, through said reservation extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof, together with necessary grounds for station and water purposes according to maps and plats of definite location, to be hereafter filed by said company with the Secretary of the Interior, and to be approved by him, the said Indians, parties hereto, for themselves and for the members of their respective tribes, hereby promising and agreeing to, at all times hereafter during their occupancy of said reser-

vation, protect the said Utah and Northern Railroad Company, its successors or assigns, in the quiet enjoyment of said right of way and appurtenances and in the peaceful operation of its road through the reservation.

ART. III. All unexecuted provisions of existing treaties between the United States and the said Indians not affected by this agreement to remain in full force; and this agreement to take effect only upon ratification hereof by Congress.

Signed at the Fort Hall Agency, in the Territory of Idaho, by the said Robert S. Gardner and Peter Gallagher on behalf of the United States, and by the undersigned chiefs, headmen, and heads of families and individual members of the Shoshone and Bannack tribes of Indians, constituting a clear majority of all the adult male Indians of said tribes occupying or interested in the lands of the Fort Hall Reservation, in conformity with article eleven of the treaty of July 3, 1868, this twenty-seventh (27th) day of May, A. D. one thousand eight hundred and eighty-seven (1887)."

(Here follow the signatures)

SEC. 2. That the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed and laid out into lots and blocks so much of the Fort Hall Reservation in the Territory of Idaho, at or near Pocatello Station, on the Utah and Northern Railway, as when the sectional and subdivisional lines are run and established shall be found to be within the following descriptions, to-wit: The west half of section twenty-five, all of section twenty-six, the east half of section twenty-seven, the northwest quarter of

section thirty-six, the north half of section thirty-five, the northeast quarter of the southwest quarter of section thirty-five, and the northeast quarter of the northeast quarter of section thirty-four, all in township six south, of range thirty-four east, of Boise Meridian, in the Territory of Idaho, and containing an area of one thousand eight hundred and forty acres, or thereabouts; saving and excepting thereout so much of the above described tracts as has heretofore been, or is hereby, granted for the use of the Utah and Northern Railroad Company.

SEC. 3. That such survey shall describe the exterior boundaries of the said town according to the lines of the public surveys, also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots, alleys, the size of the same, with measurements and area of each municipal sub-division, the lots in which shall each not exceed four thousand two hundred square feet, with a statement of the extent and general character of the improvements; such map and statement shall be verified under oath by the party making the survey; and within one month after making such verification there shall be transmitted to the General Land Office a verified transcript of such map and statement; a similar map and statement shall be filed with the register and receiver, and a similar copy shall be filed in the office of the recorder of the county wherein such town is situate.

SEC. 4. That at the time of the said survey, the Secretary of the Interior shall cause the said lots and blocks to be appraised by three disinterested persons, one of whom shall be designated by said Indians in open council and the other two by the Secretary of the Interior, who, after taking

and subscribing an oath before some competent officer to faithfully and impartially perform their duties as appraisers of said lots and blocks under the provisions of this act, which oaths shall be returned with their appraisement, shall go in person upon the ground and determine the value of each lot and parcel thereof; making lists thereof, particularly describing each lot, block, and parcel, with the appraised value thereof, as by them determined, which said list shall be verified by the affidavit of at least two of said appraisers, to the effect that said list is a correct list of the said lots, blocks, and parcels appraised by them, and that the appraisements thereof are the true value of each parcel appraised, and that the same were determined by them after due and full inspection of each and every parcel, thereof; Provided, That no lot or parcel shall be appraised at less than ten dollars, and that all improvements shall be appraised separate and distinct from the land.

SEC. 5. That upon the return of said survey, and the appraisement of said lands, if the same shall be approved by him, the Secretary of the Interior shall cause said lands to be offered for sale at public auction, at the door of the "Pocatello House," Pocatello Junction, to the highest bidder, for cash, which sale shall be advertised for at least three months previous thereto, in such manner as the said Secretary shall direct, and shall be conducted by the register of the land office in the district in which said lands are situate, in accordance with the instructions of the Commissioner of the General Land Office. Said sale shall continue from day to day until all of the said lands shall have been sold or offered for sale. The said lands shall be offered in single lots and parcels, and no bid shall be received for any lot or

parcel less than the appraised value of the same. All blocks, lots, and parcels of said lands not sold at public sale shall thereafter be subject to private entry at the appraised value thereof: Provided, That any person who has been residing upon any of said land, and has made valuable improvements thereon, shall, upon proof to that effect to the satisfaction of the Secretary of the Interior, be permitted to purchase at such sale, for cash, at the appraised value thereof, the lot or parcel so resided upon and improved by him, and in default of his exercising the preference right so conferred upon him by this section, such lot or parcel shall be sold to the highest bidder, for cash, as hereinbefore provided: Provided further, That such last mentioned purchaser shall pay the owner of such improvements the appraised value thereof, as determined under the provisions of this act; And provided further, That the right heretofore acquired by the Utah and Northern Railway Company for right of way and the use and occupancy of lands for station and depot purposes, through and upon the lands above described, shall not be affected by this act.

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SEC. 6. That the funds arising from the sale of said lands, after deducting the expenses of survey, appraisement, and sale, shall be deposited in the Treasury of the United States to the credit of the Shoshone and Bannack tribes of Indians belonging on said reservation, and shall bear interest at the rate of five per centum per annum; and the Secretary of the Interior is hereby authorized and empowered to expend all or any part of the principal and accrued interest of such fund for the benefit and support of

said Indians, in such manner, and at such times as he may deem expedient and proper.

SEC. 7. That the Secretary of the Interior shall make all needful rules and regulations necessary to carry this act into effect; he shall determine the compensation of the surveyor for his services in laying out said lands into town lots, also the compensation of the appraisers provided for in section four, and shall cause patents in fee simple to be issued to the purchasers of the lands sold under the provisions of this act in the same manner as patents are issued for the public lands.

SEC. 8. That the sum of five thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of carrying this act into effect, which said sum, or so much thereof as may be expended, shall be reimbursed to the Treasury out of the sales of said lands.

SEC. 9. That the exterior lines of the land by this act authorized to be laid out into town lots and separating the same from the lands of said reservation shall, from the date of the approval of said survey by the Secretary of the Interior, be, and constitute, the line of said reservation between the same and said town.

SEC. 10. That the citizens of the town hereinbefore provided for shall have the free and undisturbed use in common with the said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town, with right of access at all times thereto, and the right to construct, operate, and maintain all such ditches, canals, works, or other aqueducts,

drain, and sewerage pipes, and other appliances on the reservation, as may be necessary to provide said town with proper water and sewerage facilities.

SEC. 11. That there be, and is hereby, granted to the said Utah and Northern Railway Company a right of way not exceeding two hundred feet in width (except such portion of the road where the Utah and Northern and the Oregon Short Line Railways run over the same or adjoining tracks, and then only one hundred feet in width) through the lands above described, and through the remaining lands of the Fort Hall Reservation, extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof; and in addition to such right of way, grounds adjacent thereto for station buildings, depots, machine shops, side-tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road, according to maps and plats of definite location thereof respectively, to be filed by said Company with, and approved by the Secretary of the Interior, except that at and near its station at Pocatello, in Idaho Territory, said railway company is granted for its use for station grounds, depot buildings, shops, tracks, side-tracks, turn-outs, yards, and for water purposes, not to exceed one hundred and fifty acres, as shown by maps and plats of the definite location thereof; and said company shall pay for said one hundred and fifty acres, in addition to the eight dollars per acre provided in said agreement, a further sum equal to the average appraisal of each acre of town lots in the proposed townsite of Pocatello, outside of said one hundred and fifty acres, provided for in section four of this act, said eight dollars per

acre to be paid within one year from the passage of this act, and said additional sum immediately upon the completion of the appraisement aforesaid: Provided, That all lands acquired by said railway company near its station at Pocatello for its use for station grounds, depot buildings, shops, tracks, side-tracks, turn-outs, yards, and for water purposes, as hereinbefore provided, shall, whenever used by said railway company, or its assigns, for other purposes, be forfeited and revert to the United States, and be subject to the other provisions of this act: Provided further, That the said Utah and Northern Railway Company shall first pay to the Secretary of the Interior, for the use and benefit of the said Shoshone and Bannack tribes of Indians, the sum of eight dollars per acre for, or in respect of each and every acre of land so taken and used for said right of way and station grounds, in conformity with said maps of definite location, the moneys derived from this source to be deposited in the Treasury of the United States, to the credit of the said Shoshone and Bannack Indians, bearing interest at five per centum per annum, with like power in the Secretary of the Interior, from time to time, to apply all or any part of the principal and accrued interest thereof, for the benefit and support of said Indians in the same manner as is hereinbefore provided with regard to the funds arising from the sale of lands of the Fort Hall Reservation: And provided, further, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used, except in such manner and for such purposes only as shall be necessary for the construction, maintenance, and convenient operation of a railway, telegraph or telephone lines, and when any portion thereof shall cease to be

so used, such portion shall revert to the tribe or tribes of Indians from which the same shall have been taken, or in case they shall have ceased to occupy said reservation, to the United States; and the construction, maintenance, and operation of said railway shall be conducted with a due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision.

SEC. 12. That the officers, servants, and employees of said company necessary to the construction and management of said road, shall, while so engaged, be allowed to reside upon said right of way, and station grounds hereby granted, but subject, in so far as the reservation lands are concerned, to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior in accordance with the said intercourse laws.

SEC. 13. That said railway company shall fence, and keep fenced, all such portions of its road as may run through any improved lands of the Indians, and also shall construct and maintain continually all road and highway crossings and necessary bridges over said railway, wherever said roads and highways do now or may hereafter cross said railway's right of way, or may be, by the proper authorities, laid out across the same.

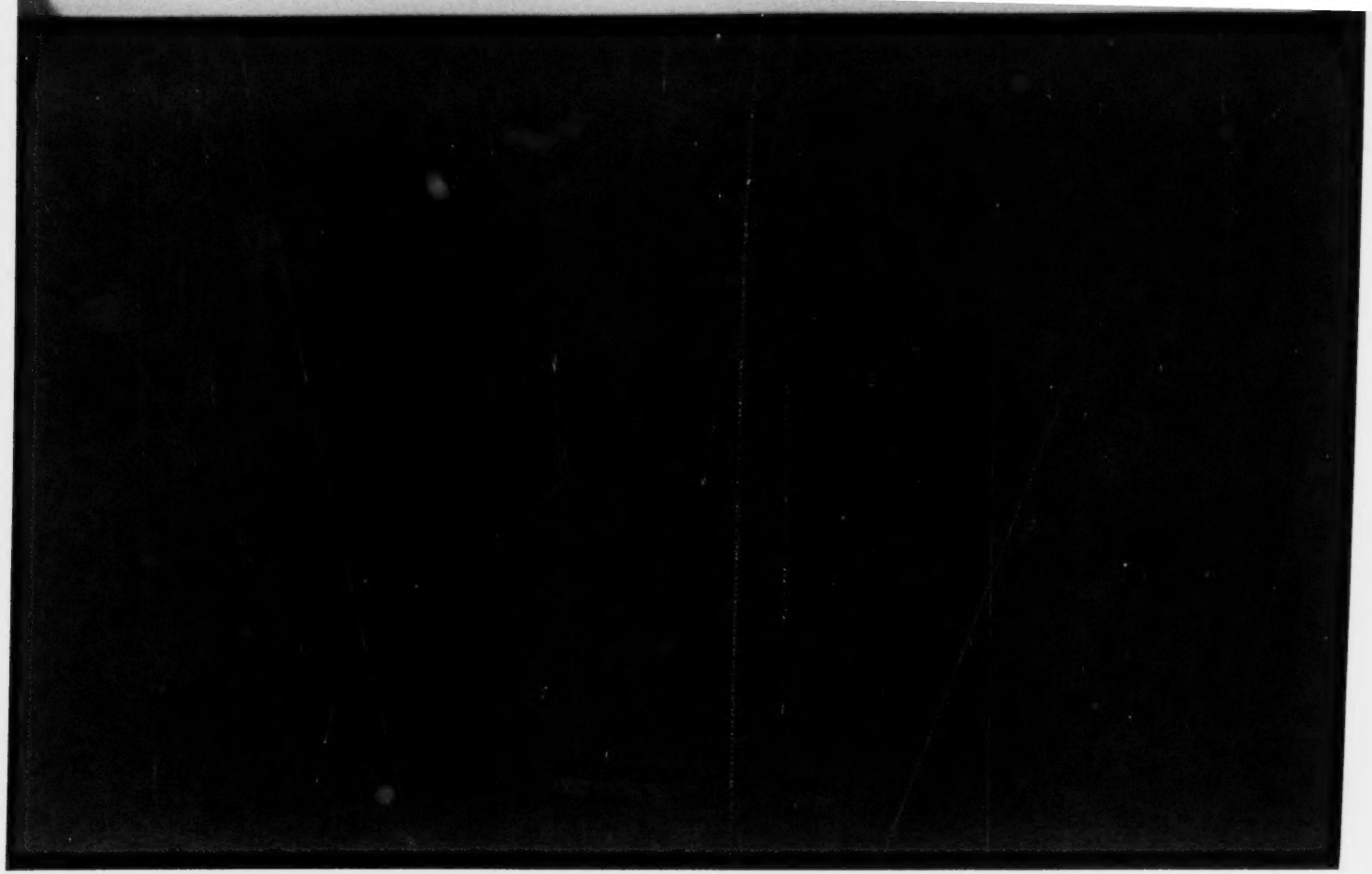
SEC. 14. That said railway company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the

killing or maiming of any Indian belonging to said tribes, or either of them, or of their live-stock, in the construction or operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to affect an amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States attorney in the name of the United States; Provided, That all moneys so recovered by the United States attorney under the provisions of this section, shall be covered into the Treasury of the United States, to be placed to the credit of the particular Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior.

SEC. 15. That the said Utah and Northern Railway Company shall accept this right of way upon the expressed condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their remaining lands, and will not attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided: Provided, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this act.

SEC. 16. That Congress may, at any time, amend, add to, alter, or repeal this act.

Approved, September 1, 1888.



INDEX

CITATIONS

257891—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 348

THE OREGON SHORT LINE RAILROAD COMPANY, A CORPORATION, AND SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court and the circuit court of appeals are not reported but may be found in the record at pages 36–43 and 56–69, respectively.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered June 27, 1940 (R. 70). The petition for a writ of certiorari was

filed August 20, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Act of September 1, 1888, granted a railroad right of way through an Indian reservation and required the railroad to execute a ten thousand dollar bond to the United States "conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes". The question is whether the Act imposes liability independent of negligence for damages caused by the operation of trains through the reservation.

STATUTE INVOLVED

The pertinent provision of the Act of September 1, 1888, c. 936, Sec. 14, 25 Stat. 452, is set forth in the Statement at pages 3–4, *infra*.

STATEMENT

The United States, on behalf of the Shoshone and Bannack tribes of Indians, brought this suit pursuant to Section 14 of the Act of September 1, 1888, c. 936, 25 Stat. 452, 456, and on a bond given thereunder, to recover damages in the sum of $10,000 for the killing and maiming of four Indians (R. 2–20).

The Fort Hall Indian Reservation was established for the Shoshone and Bannack Indians by

the Treaty of July 3, 1868, 15 Stat. 673. This treaty provides in part:

> And the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians * * *.

Neither the Oregon Shortline Railroad Company nor its predecessor, the Utah and Northern Railroad Company, was one of the persons authorized to go upon the lands designated by the treaty (R. 4–5). Nevertheless, the Utah and Northern Railroad Company constructed its line through the Fort Hall Indian Reservation without having first obtained a right of way.

To adjust the rights of the tribe and to enable the railroad company to acquire the necessary right of way through the reservation, the United States and the Shoshone and Bannack tribes entered into an agreement which was accepted and ratified by Congress by the Act of September 1, 1888, c. 936, 25 Stat. 452. Section 14 of the Act provides:

> That said railway company shall execute a bond to the United States * * * in the penal sum of ten thousand dollars, for the

> use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their live stock, in the construction and operation of said railway, or by reason of fires originating thereby; the damages in all cases * * * to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States attorney in the name of the United States * * *.

The Oregon Shortline Railroad Company and St. Paul-Mercury Indemnity Company executed a bond as contemplated by the foregoing section (R. 8–10). The bond recites the statutory grant of the right of way and the pertinent part of Section 14, and further provides (R. 9):

> Now, therefore, if the said Oregon Shortline Railroad Company, its successors or assigns, shall make full satisfaction for any and all such deaths, injuries, or damages, then this obligation shall be null and void; otherwise, to remain in full force and effect.

On January 19, 1938, at a railroad crossing within the Fort Hall Reservation, a train operated by the defendant railroad collided with an automobile occupied by four Indians of the Shoshone and Bannack tribes (R. 11). Three of the Indians were

killed and the fourth was injured (R. 12). This suit was filed after both the railroad and the surety on its bond failed to pay the damages upon demand (R. 12).

The United States took the position that under the statute and bond the liability of the railroad and its surety was not dependent upon negligence. The district court rejected this contention and dismissed the complaint on the ground that it did not state a claim upon which relief could be granted. (R. 36–44.)

The Government appealed and the judgment of the district court was reversed (R. 70). The court of appeals held that it was clear from the statute and surrounding circumstances that it was the purpose of Congress to place upon the railroad rather than the aborigine the full burden of all losses occasioned by the operation of trains through the reservation (R. 56–67). One member of the court took the position that it was unnecessary to construe the statute but concurred in the result on the ground that the Government, under the terms of the bond, was not required to prove that the damages resulted from the railroad's negligence (R. 67–69).

ARGUMENT

1. The court of appeals correctly held that, in their popular sense, the words of the statute "reasonably import the broad purpose of saving the Indians harmless, or of insuring them against loss

even though occasioned by inevitable accident" (R. 60). Under the statute the railroad and its surety are required to make "due payment of *any and all damages which may accrue* by reason of the killing or maiming of any Indian * * *" (italics supplied). Clearly, the terms of the statute do not limit liability to damages resulting from negligent operation of the railroad.

Petitioners recognize (p. 8) that Congress is presumed to use words with their known and ordinary meaning. Nevertheless, they assert (p. 16) that the word "damages" means "compensation to be recovered for a wrongful act" and argue that they therefore are not liable in the absence of negligence or other wrongful act. This argument assumes that Congress used the word in a highly technical sense and ignores the fact that the ordinary meaning of damage is simply "loss due to injury" or "injury or harm to person, property, or reputation." Webster, New International Dictionary (2d ed. 1936), p. 664.

2. Even if the statute were ambiguous the circumstances surrounding its passage would, as the court of appeals pointed out (R. 61–67), compel the conclusion that it was the purpose of Congress to impose liability independent of the railroad's negligence.

Prior to 1888, the year in which the Act in question was passed, statutes had been enacted in many states imposing absolute liability on railroad com-

panies for damages caused by fire.[1] Also, a number of states had adopted statutes imposing absolute liability for the killing of livestock and injuries to passengers.[2] Thus, when it granted a right of way through the Fort Hall Reservation, Congress had ample precedent for requiring the railroad to accept unconditional responsibility for all losses to Indian life and property.

The report of the House Committee on Indian Affairs, referring to the bill which became the 1888 Act, states (R. 20):

> Provision is made for indemnification by the railway company to the Indians for killing or maiming the Indians or their stock; also for fencing in the railway track where it runs through the improved lands of the Indians. *We believe, in short, that every interest of the Indians has been jealously guarded and protected.* [Italics supplied.]

The jealous safeguarding of the Indians, "could hardly be thought to lie in the mere exaction of security for the payment of 'legal' damages, recoverable only on proof of negligence" (R. 66). There is no indication that Congress was concerned with the solvency of the railroad. In fact an earlier statute which granted to the same railroad a

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[1] See *St. Louis & San Francisco R'y* v. *Mathews*, 165 U. S. 1, containing a history and summary of the various statutes then in effect. See also note (1928) 53 A. L. R. 875–879.

[2] See *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512, and note (1928) 53 A. L. R. 879–882.

right of way over a different part of the same reservation required no bond, but the grant was to be forfeited in the event the railroad failed to "pay any and all damages" sustained by the Indians. Act of July 3, 1882, c. 268, Sec. 3, 22 Stat. 148.

The Act of 1888 must be construed to protect the dependent people for whose benefit it was passed. Cf. *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89; *Choate* v. *Trapp*, 224 U. S. 665, 675. When the statute is considered in its setting it is apparent that Congress intended to impose liability independent of the railroad's negligence and thus afford the Indians a measure of protection commensurate with the increased hazards to which they were subjected.

3. Petitioners assert (p. 9) that this case presents an important question which, unless settled by this Court, will be frequently recurring. However, it is evident that the question is not important. This seems to be the only case which has arisen in the fifty-two years since the statute was passed. Moreover, the statute which petitioners ask this Court to construe is not one of general applicability but affects only the fifteen mile right of way here involved.

CONCLUSION

The decision of the court of appeals is correct and presents neither a conflict of decisions nor a

question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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ROBT. E. MULRONEY,
Acting Head, Lands Division.
CHARLES R. DENNY,
Attorney.

SEPTEMBER, 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940